Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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SUMMARY

The Supreme Court's decision in *AT&T v. Iowa Utilities Board* presents the Commission with a tremendous opportunity to build upon the "national framework" for local competition it established in its *Local Competition First Report and Order* nearly three years ago. As described in these comments, ALTS believes that national, minimum unbundling rules remain essential to the development of facilities-based local competition.

To safeguard the viability of UNEs as a method of entry, the Commission must reject any proposal that would allow ILECs to open a new fifty-state effort to dismantle its rules. Instead, the Commission must adopt a certain and effective mechanism for adding and removing UNEs from its minimum national unbundling requirements. After a two year gestation period, ILECs would bear the burden of proof with regard to removing UNEs from the list, consistent with the requirements of Section 251(d)(2).

Per the Supreme Court's guidance, the Commission should give substance to the "necessary" and "impair" standards by incorporating a "materiality" test. Applying the test, the Commission must look to non-ILEC sources for alternative elements and must determine whether such alternatives are reasonable substitutes by considering multiple factors, including functionality, quality of service, scope of availability, and delay to market. If, based on these factors, a requesting carrier's ability to compete is diminished materially, unbundling of the ILEC network element must be required.

With regard to the "necessary" standard, the Commission should affirm its conclusion that the standard applies only to network elements that are "proprietary in nature." A network element is "proprietary in nature" if use of or access to that element

necessarily reveals incumbent-specific methods or processes covered by intellectual property rights and protections, including those available under copyright, patent and trademark law.

Application of the Section 251(d)(2) unbundling standards, demonstrates that loops, the NID, interoffice transport, signaling networks and call-related databases, and OSS meet the "impair" test, and therefore should remain on the Commission's national, minimum list of UNEs. Significantly, the definitions of those UNEs should be modified to make explicitly clear that: (1) cross-connects must be included with loops; (2) all varieties of loops, including "clean copper," high capacity, and dark fiber loops, must be unbundled; (3) loop equivalents must be provided where IDLCs are deployed; (4) subloop elements must be unbundled; (5) "entrance facilities," high capacity transport, and dark fiber transport facilities must be unbundled; and (6) loop qualification information must be made available through OSS on a nondiscriminatory basis.

Consistent with the Section 251 standards, the Commission also should establish several new UNEs critical to the development of widespread local competition and the delivery of broadband services. Indeed, facilities-based competitors' ability to deliver alternative service offerings to consumers has been and will continue to be diminished materially by the absence of unbundled access to ILEC extended link, intraMTE wiring, data, and multiplexing/aggregation/routing facilities.

The Supreme Court's reinstatement of Rule 315(b) gives the Commission the opportunity to ensure that competitors have access to UNE combinations as intended by Congress. To ensure that competitors are not stymied in their efforts to implement the rule, the Commission explicitly should find that: (1) ILECs must make available any

technically feasible UNE combination; (2) ILECs may not in any way restrict the use of UNE combinations; and (3) UNEs need not be combined at the collocation space of the requesting carrier. To eliminate unnecessary litigation, the Commission also should begin to identify specific UNE combinations that must be provisioned under Rule 315(b). The Commission should start this process by identifying the following common configurations as being among those the ILECs must provision at cost-based rates: (1) combinations of loops, multiplexing/aggregation/routing devices, and transport; (2) combinations of transport, multiplexing/aggregation/routing devices, and transport; and (3) combinations of loops or subloop elements and intraMTE wiring.

Finally, the Commission should establish minimum UNE pricing standards to provide the states with additional guidelines necessary to ensure the usefulness of UNEs as a method of entry. To ensure reasonable and nondiscriminatory rates and charges, the Commission should find that major disparities in an ILEC's rates for the same UNEs in different states and major disparities in rates for the same UNEs among different ILECs presumptively are unreasonable. Further, the Commission should: (1) require that ILECs make UNEs available at volume and term discounts; (2) enforce its rules requiring geographically deaveraged UNE rates; (3) clarify that ILECs may not impose "glue" charges when provisioning combinations; and (4) establish pricing standards for digitally conditioned loops.

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COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

The Association for Local Telecommunications Service ("ALTS"), by its attorneys, hereby submits these comments on the Commission's *Second Further Notice of Proposed Rulemaking ("FNPRM")* in the above-captioned proceeding.[1] ALTS is the leading national trade association representing facilities-based competitive local exchange carriers ("CLECs").

Introduction

The Supreme Court's decision in *AT&T v. Iowa Utilities Board*[2] presents the Commission with a tremendous opportunity to build upon the "national framework" for local competition it established in its *Local Competition First Report and Order* nearly

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1 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, *Second Further Notice of Proposed Rulemaking* (rel. Apr. 16, 1999) (*"FNPRM"*).

2 *Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997) (*"Iowa Utils. Bd"*), *cert. granted sub nom., AT&T Corp. v. Iowa Utils. Bd.,* 118 S.Ct. 879 (1998), *aff'd in part, rev'd in part,* 119 S.Ct. 721 (1999) (*"AT&T"*).

three years ago.[3] Indeed, the Supreme Court vindicated the Commission's national framework and affirmed nearly all aspects of its implementation of the local competition provisions of the Telecommunications Act of 1996 ("1996 Act" or "Act").[4]

However, in this remand proceeding, the Commission must readdress its interpretation of Section 251(d)(2)'s "necessary" and "impair"[5] standards for unbundling by (1) supplying some limiting rationale to its interpretation of these provisions, and (2) by evaluating the availability of reasonable alternatives to incumbent local exchange carrier ("ILEC") network elements that may be available from non-ILEC sources. As explained below, ALTS submits that this should be addressed by assessing whether or not reasonable substitutes are available in a fully functioning competitive wholesale market for network elements. If no such substitutes are available, a requesting carrier's ability to compete would be materially diminished, and unbundling must be required.

To achieve the pro-competitive goals of the Act, the Section 251(d)(2) standards must be applied in a manner that preserves the viability of unbundled network elements ("UNE") as a method of market entry. Accordingly, the Commission must reinstate many existing UNEs and must add new UNEs to remove barriers to entry and to encourage the deployment of advanced services. For consumers to realize the maximum potential benefit of its unbundling rules, the Commission also must make several modifications to its existing UNE definitions and must make affirmative pronouncements

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3 *Implementation of the Local Telecommunications Provisions in the 1996 Act,* CC Docket No. 96-98, *First Report and Order,* 11 FCC Rcd 15499 (1996) (*"Local Competition First Report and Order"*).

4 Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* ("1996 Act").

5 47 U.S.C. § 251(d)(2).

barring ILEC end-runs around its unbundling rules. Explicit direction from the Commission should eliminate the type of unnecessary litigation that has hampered the development of local competition. Finally, the Commission also must act to ensure that UNEs are priced in a manner consistent with the Act's cost-based standard and the Commission's implementation rules. Here, too, thoughtful and explicit direction can do much to dismantle the barriers that stand in the path toward widespread local competition.

In sum, the Commission should approach this remand proceeding as a means of building upon the solid foundation it already has established. National minimum unbundling standards remain the most efficient way to spur widespread development of local competition and the deployment of advanced services. With the Supreme Court's decision in place, local competition should continue to develop at a faster pace and on a broader scale than previously was possible. By adopting effective new standards and unbundling rules in this proceeding, the Commission can do much to expand the pace and breadth of local competition. Below, ALTS discusses in detail the standards that should be adopted for the necessary and impair tests, and the UNEs that should be established through the application of these tests. In a subsequent filing, ALTS will submit proposed rules consistent with this discussion.

I. NATIONAL, UNIFORM, MINIMUM UNBUNDLING STANDARDS REMAIN ESSENTIAL TO THE DEVELOPMENT OF LOCAL COMPETITION

ALTS concurs in the Commission's tentative conclusion that it "should continue to identify a minimum set of network elements that must be unbundled on a nationwide

basis."[6] As the Commission observes, there is nothing in the Supreme Court's decision that calls into question the Commission's decision to establish minimum national unbundling requirements.[7] The rationale supporting this conclusion remains as valid today as it was three years ago when the Commission adopted it in its *First Report and Order.*[8] There, the Commission concluded that, by identifying a specific list of network elements that must be unbundled and applied uniformly in all states and territories it would best further the "national policy framework"[9] established by Congress to promote local competition.[10] Specifically, the Commission found that a national list would: (1) allow requesting carriers, including small entities, to take advantage of economies of scale; (2) provide financial markets with greater certainty in assessing competitors' business plans; (3) facilitate the states' ability to conduct arbitrations; and (4) reduce the likelihood of unnecessary litigation, regarding the requirements of section 251(c)(3), that strains resources of competitive local exchange carriers ("CLECs") and state commissions.[11]

Three years of experience in implementing the 1996 Act proves just how prescient the Commission was in adopting minimum national unbundling standards. This experience demonstrates that uniform nationwide standards are no less necessary today, as local competition is still very much in its nascent state. Indeed, the Commission

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6 *FNPRM*, ¶ 14.

7 *Id.*

8 *Local Competition First Report and Order*, ¶¶ 241-48, 281-83.

9 S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement).

10 *Local Competition First Report and Order*, ¶¶ 241-48.

11 *Id.*

recently affirmed its minimum national standards rationale in its order expanding its minimum national collocation requirements.[12] In its *Advanced Services Collocation Order*, the Commission emphasized that such action was necessary to further the pro-competitive goals of the Act and to encourage competitors' deployment of advanced services.[13]

ALTS also supports the Commission's tentative conclusion to continue to allow the state commissions to impose additional unbundling requirements, pursuant to Section 251(d)(2).[14] This approach effectively has allowed the states to function as testing grounds for local competition. Indeed, the process has produced numerous "best practices," including the establishment of dark fiber transport and high capacity loops as UNEs. As ALTS discusses below, such decisions are essential to the development of facilities-based local competition and this Commission should incorporate these state "best practices" into its minimum national standards. Allowing states to impose additional unbundling requirements also may afford states the flexibility to spur competition where it is slow to develop or to encourage the deployment of advanced services pursuant to the states' own duties under Section 706.

With ample evidence that uniform, national standards for UNEs are critical to the development of local competition, ALTS believes that the Commission must reject any proposal which would upend such a system by empowering state commissions in the first

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12 *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, *First Report and Order, and Further Notice of Proposed Rulemaking*, ¶ 23 (rel. Mar. 31, 1999) (*"Advanced Services Collocation Order"*).

13 *See id.*, ¶¶ 23-24.

14 *FNPRM*, ¶ 14.

instance to remove network elements from the list of national minimum unbundling requirements. Such an approach runs counter to every rationale put forth by the Commission (and ALTS) in favor of national minimum standards, as it would invite state-by-state Balkanization of the national list of UNEs that now serves as the bedrock foundation of local competition. A state-by-state approach to dismantling the national list also would generate an additional layer of multi-front litigation that would be unsustainable by many small and medium sized CLECs.

II. THE COMMISSION MUST ADOPT A CERTAIN AND EFFECTIVE MECHANISM FOR MODIFYING ITS NATIONAL MINIMUM UNBUNDLING REQUIREMENTS

ALTS submits that it is reasonable to adopt a mechanism for modifying the national minimum list of UNEs over time, in response to changes in technology and the development of competitive wholesale markets for network elements.[15] However, ALTS emphasizes that this mechanism must serve a dual purpose. Specifically, it should be used, not only to retire UNEs as competitive alternatives become available, but also to *add new* UNEs as technological developments and network evolution require. ALTS proposes that this be accomplished through a Commission-conducted biennial review process. As discussed above, ALTS believes that state oversight of such a process likely would lead to the Balkanization of the national minimum standards, and therefore would eliminate most, if not all, of the benefits of having a national list in the first place.

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15 *FNPRM*, ¶ 36 ("[W]e seek comment on whether the Commission should adopt a mechanism by which network elements would no longer have to be unbundled at a future date.").

Further, ALTS believes that a two year review cycle in which a fresh Section 251(d)(2) analysis is conducted for UNEs will balance CLECs' interest in business certainty and the ILECs' economic interest in limiting access to the extent permissible by law. Indeed, because local competition is only in its nascent stages, ALTS submits that the Commission should find that the public interest requires that all UNEs made available in this proceeding should remain available through the conclusion of the first biennial review process.

In addition to the biennial review process, ALTS believes that competitors should be able to petition the Commission to add elements to the national minimum list or to clarify definitions and requirements, as experience deems necessary. In such cases, CLECs would have the burden of proving that the requested unbundling requirement meets the necessary or impair tests and is otherwise consistent with the public interest. In the case of any new element added to the national list, ILECs should have 120 days to bring themselves into compliance with the new unbundling requirement. A new UNE should be available at a reasonable approximation of total element long-run incremental cost ("TELRIC") negotiated by the parties, and will be subject to retroactive true-up to final TELRIC rates established by state commissions. Consistent with the time frame established for arbitrations conducted under Section 252 of the Act, state commissions must set TELRIC-based rates for new UNEs within nine months of the issuance of an FCC order establishing such a requirement.

With regard to removing particular elements from the national list, ALTS believes that, in the first biennial review, ILECs should have the burden of proving that specific UNEs no longer meet the necessary and impair tests and that unbundling of a particular

element is no longer consistent with the public interest. Significantly, ALTS notes that the Commission's practice of adopting national, minimum unbundling standards is consistent with Section 251(d)(2) and was in no way challenged by the Supreme Court's decision. It is eminently reasonable – particularly in light of the fact that local competition is merely in its nascent stage – for the Commission to apply the "necessary" and "impair" standards on a national basis. Business certainty and administrative necessity compel such a conclusion. To the extent that the Commission feels compelled to address geographic variations in the availability of UNEs, it should consider doing so only after an initial two year gestation period. Rather than retire UNEs from the national list entirely, the Commission might then consider adopting an approach whereby exceptions to national unbundling requirements are made on a state-by-state basis. Such an approach will recognize the development of competitive wholesale network element markets in particular states, while preserving the benefits of national uniformity for all others. If the Commission were to adopt such a process, the ILECs would bear the burden of proof in demonstrating that neither the necessary and impair standards nor the public interest requires unbundling of a particular UNE in a specific state. Under such a plan the Commission should consult with the relevant state commissions.

In order to minimize disruption to the industry, whenever the FCC retires a UNE, it should "grandfather" all UNEs currently being provided at that time.[16] This means that

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16 Such "grandfathering" is a common practice throughout the telecommunications industry. For example, Southwestern Bell Telephone Company maintains in its tariff an entire section of Special Access services called "Vintage Services." This section contains rates for various Special Access services that generally were available at some time in the past, but are no longer available, except for existing customers that are grandfathered for the remaining term of their service contracts. *See* Tariff F.C.C. No. 73, § 20.6 (Vintage Services). Dark fiber is another

ILECs should be required to continue providing the UNE at TELRIC-based prices, pursuant to the terms of effective interconnection agreements with CLECs or current state orders. As those agreements expire, the ILECs' obligations to provide cost-based unbundled access to a particular UNE also will terminate. However, such termination may not result in disruption of service to competitive carriers and end users. To safeguard against such disruption, the Commission must make clear that, upon expiration of a UNE, ILECs are obligated to make a wholesale offering with equivalent functionality available to competitors. With regard to such a service, the ILEC should be required to provide a seamless transition from the UNE with no end user service disruption.

Several additional measures are necessary to ensure a smooth transitioning or phase-out of an unbundling requirement. Because CLECs and ILECs typically choose to extend their agreements during the period of renegotiation, termination dates are not always clear. As another safeguard against the potential of end user service disruption, ALTS submits that ILECs should be required to give CLECs 120 days' notice before terminating its provisioning of a particular UNE. During this time, CLECs should be able to petition the FCC for a waiver to allow continued access to UNEs in specific

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example of a service that has been grandfathered for years. At one time, the Commission required several ILECs to provide dark fiber at prescribed rates in their federal tariffs. This policy changed in 1994, and those ILECs ceased providing dark fiber as a generally available offering. The ILECs still provide the service to customers that had dark fiber service arrangements in effect when the general offering was retired. *E.g.*, Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, § 22, note 1 ("The Telephone Company's providing of Dark Fiber Arrangements is limited to existing installations at existing locations for existing customers (*i.e.*, only those arrangements in service) as of June 7, 1994, or arrangements for which the Telephone Company has received an Access Service Request prior to June 7, 1994.").

instances. If CLECs are able to demonstrate that unbundling meets the necessary and impair tests and is otherwise consistent with the public interest, the FCC should grant a stay of its exception to or general lifting of an unbundling requirement and should require that unbundling be continued in the specific area at issue. For this mechanism to be effective, the Commission must commit to a hearing and ruling on waiver petitions within 90 days.

III. THE COMMISSION MUST DEFINE THE "NECESSARY" AND "IMPAIR" STANDARDS IN A MANNER THAT MAINTAINS THE VIABILITY OF UNEs AS A METHOD OF ENTRY

Section 251(d)(2) provides:

> In determining what network elements should be made available for the purposes of subsection (c)(3), the Commission shall consider at a minimum, whether –
>
> (A) access to such network elements as are proprietary in nature is *necessary*; and
>
> (B) the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.[17]

This statutory test for determining which network elements must be unbundled, incorporates two separate standards – "necessary" and "impair" – which the Commission must consider in its decision making. In the *Local Competition First Report and Order,* the Commission premised its interpretation of these standards on its conclusion that Section 251(c)(3) imposes on ILECs "the duty to provide all network elements for which it is technically feasible to provide access on an unbundled basis."[18] With this premise in

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17 47 U.S.C. § 251(d)(2) (emphasis added).

18 *Local Competition First Report and Order,* ¶ 278.

place, the Commission determined Section 252(d)(2) authorized the Commission to make exceptions from the general unbundling requirement based on the necessary and impair standards.[19] Interpreting those standards, the Commission found that "necessary" means that "an element is a prerequisite for competition" and explained that, "in some instances it will be 'necessary' for new entrants to obtain access to proprietary elements (*e.g.*, elements with proprietary protocols or elements containing proprietary information) [that necessarily will be revealed if the element is provided as a UNE], because without such access, their ability to compete would be significantly impaired or thwarted."[20] The Commission also determined that "'impair' means [] to become worse [or] diminish in value"[21] and explained that "an entrant's ability to offer a telecommunications service is 'diminished in value' if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises."[22] Under both standards, the Commission declined to consider the availability of an element from a source outside the ILECs' networks.[23]

The Supreme Court, however, disagreed with the Commission's premise.[24] Rather than establishing unbundling obligations only on the basis of whether or not it is technically feasible to unbundle an element, the Court found that unbundling determinations instead also must be based on the "necessary" and "impair" standards

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19 *Id.*, ¶ 279.

20 *Id.*, ¶ 282.

21 *Id.*, ¶ 285.

22 *Id.*, (citing Random House College Dictionary).

23 *Id.*, ¶¶ 283, 286.

24 *AT&T*, 119 S.Ct. at 736.

incorporated into Section 251(d)(2). Addressing the general framework for unbundling requirements, the Court held that:

> Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the "necessary" and "impair" requirements.[25]

Writing for the Court, Justice Scalia concluded that it was not reasonable for the Commission to interpret the necessary and impair standards in a way that disregards entirely the availability of elements outside ILEC networks and equates impairment with *any* increased cost or decrease in service quality that results from failure to obtain unbundled access to a network element.[26]

On remand, the Commission must address both of these shortcomings. It also must ensure that its modified interpretation of the necessary and impair standards maintains the viability of competitive entry through the use of unbundled elements, as intended by the framers of the 1996 Act. To do so, the Commission must ensure certain, uniform and ubiquitous access to critical network functions that are not otherwise reasonably available to competitive local service providers.

A. The Difference Between the "Necessary" and "Impair" Standards Is That the Former Requires Assessment of Whether a Non-Proprietary Substitute Is Available for a "Proprietary" Network Element

The 1996 Act establishes two standards for determining whether ILECs must make UNEs available – the "necessary" test for proprietary network elements and the

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25 *Id.* (emphasis added).

26 *Id.*

"impair" test for non-proprietary elements. This necessarily implies that there is *some* difference between the tests. As ALTS discusses below, the key distinction between the two tests is that the necessary test requires an additional level of inquiry: whether the network element is proprietary and, if so, whether a non-proprietary ILEC or non-ILEC network element can be used as a reasonable substitute.[27] The presence of two standards, however, does not suggest that the Commission should consider the impact of its unbundling decisions on competitors' ability to compete in one instance, but not in the other. Rather, ALTS submits that, consistent with the objectives of the Act, the Commission, in applying either the necessary or the impair standard, must consider whether requesting carriers' ability to compete materially will be diminished.[28] Under either standard, the Commission must consider non-ILEC sources and several factors – cost, quality of service, scope of availability, timeliness of provisioning, and other factors

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27 *FNPRM*, ¶ 18 ("We seek comment on the difference between the 'necessary' standard under section 251(d)(2)(A) and the 'impair' standard of section 251(d)(2)(B)."); *see also Local Competition First Report and Order*, ¶ 388 (indicating that the necessary test involves a two part inquiry: (1) whether the network element is proprietary and (2) "a showing that a new entrant can offer the proposed telecommunications service through the use of other, nonproprietary elements in the incumbent LEC's network." (on remand, the Commission must expand the search for a suitable substitute to include non-ILEC sources as well)).

28 *FNPRM*, ¶ 17 ("Should the Commission adopt a standard by which we examine whether the new entrant's ability to offer a telecommunications service in a competitive manner is materially diminished in value?). The FCC has also used a "materiality" standard in promulgating rules under the Freedom of Information Act. *See In re Examination of Current Policy Considering the Treatment of Confidential Information Submitted to the Commission*, 11 FCC Rcd 12406, 12418 (1996) (describing Commission's policy of considering the *materiality* of the information sought in determining whether to publicly release documents under the Freedom of Information Act) (citing *In re of Kannapolis Television Company WCCB-TV, Inc. on Request for Inspection of Records*, 80 FCC 2d 307, 310 (1980).

consistent with the public interest – in evaluating the impact of UNE access on CLECs' ability to provide service.[29] These sources and factors are explained below.

B. Section 251(d)(2)(A) Ensures Access to Proprietary Network Functionalities "Necessary" for Facilities-Based Competition

As indicated above, the Supreme Court held that in failing to consider alternative sources for network elements outside the ILECs' networks, the Commission had failed to interpret reasonably the "necessary" standard in Section 251(d)(2)(A).[30] Below, ALTS sets forth a reasonable interpretation of that standard that ensures facilities-based competitors the access they need to compete, innovate, and succeed, while affording appropriate protection to ILECs' proprietary protocols and processes. However, before delving into what the "necessary" standard means and how it should be applied, it is important to clarify when the standard applies.

1. The Necessary Standard Applies Only with Respect to Proprietary Network Elements

The plain language of this section indicates that the necessary standard must be considered only when "proprietary" network elements are at issue. The Commission correctly reached this conclusion in its *Local Competition First Report and Order* analysis of the necessary and impair standards, the Eighth Circuit applied the same

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29 *FNPRM*, ¶ 18 ("Since the 1996 Act employs two different terms, must the Commission apply different criteria to determine whether a network element meets these standards?").

30 *AT&T*, 119 S.Ct. at 735 ("The Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbents' network.").

construction, and the Supreme Court's decision gives no reason to question it.[31] Thus, when proprietary aspects of network elements are neither implicated nor disclosed, the necessary standard need not be considered.

2. To Give the Statute its Intended Effect, the Term "Proprietary" Must Be Construed Narrowly

Although the Supreme Court did not pass judgment on the Commission's interpretation of the term "proprietary," the Commission appropriately seeks comment on the meaning of that term.[32] In its *Local Competition First Report and Order,* the Commission described proprietary network elements as those "elements with proprietary protocols or elements containing proprietary information."[33] The Commission also acknowledged that a meaningful distinction should be made on the basis of whether proprietary information would be revealed as a result of providing unbundled access to a particular element.[34] To prevent unnecessary litigation and delay, ALTS believes that the Commission should establish more definitive parameters for determining what is "proprietary" for the purposes of Section 251(d)(2)(A).

Accordingly, ALTS submits the following definition for determining when "proprietary" information, protocols, or processes trigger application of the necessary standard in Section 251(d)(2)(A):

> *A network element is "proprietary in nature" if use of or access to that element necessarily reveals incumbent-*

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31 *See FNPRM,* ¶ 19; *Local Competition First Report and Order,* ¶¶ 277-88; *Iowa Utils. Bd.,* 120 F.3d at 811 n.31; *AT&T,* 119 S.Ct. at 734-36.

32 *FNPRM,* ¶ 15.

33 *Local Competition First Report and Order,* ¶ 282.

34 *See id.* ¶ 283; *see also id.* ¶ 388.

> *specific methods or processes covered by intellectual property rights and protections, including those available under copyright, patent and trademark law.*

Importantly, this definition carries the distinction between disclosure and use recognized by the Commission in the *Local Competition First Report and Order.* The necessary standard only should be triggered when proprietary aspects of a network element necessarily are revealed when the particular element is unbundled.[35] Thus, for example, if unbundling merely will give a requesting carrier the benefit of a proprietary methodology, but does not disclose the methodology, the network element is not "proprietary" for the purposes of Section 251(d)(2)(A). Moreover, if it is technically feasible to unbundle an element in a manner that does not disclose information that an ILEC claims is proprietary, the element should not be considered "proprietary" for the purposes of Section 251(d)(2)(A). ALTS' definition also embraces the principle that the term "proprietary" should be limited to information, software, or technology that can be protected by patents, copyrights, or trade secrecy laws.[36] This limiting rationale properly balances the Commission's overarching interest in promoting local competition with its interest in encouraging innovation.

Beyond establishing a definitional approach for determining what qualifies as a "proprietary" trigger of the necessary test, ALTS concurs with the Commission's *First*

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35 *See FNPRM,* ¶ 15 ("If a network element contains what parties assert to be proprietary information, but access to that information is not accessible by third parties seeking access to a particular element, should the entire element be considered proprietary for the purposes of section 251(d)(2)(A)?").

36 *See id.* ("Commenters should discuss whether the term 'proprietary' should be limited to information, software, or technology that can be protected by patents, copyrights, or trade secrecy laws, or whether it can also apply to materials that do not qualify for such legal protection.").

Report and Order and *FNPRM* parameters setting forth what does not – or may not – qualify as proprietary. Specifically, ALTS agrees that ILEC signaling protocols that adhere to Telcordia (formerly Bellcore) standards are not proprietary in nature because they use industry-wide, rather than ILEC-specific protocols.[37] As suggested in the *FNPRM,* the same rationale should be extended to apply to all applications. Network elements should be considered non-proprietary if the interfaces, functions, features and capabilities sought by the requesting carrier are defined by recognized industry standard-setting bodies (*e.g.,* ITU, ANSI, or IEEE), are defined by Telcordia (Bellcore) general requirements, or otherwise are available from alternative vendors.[38] For the same reasons, ALTS submits that non-carrier specific standards presumptively should be considered generally available and cannot be deemed "proprietary."[39]

Similarly, ALTS submits that the term "proprietary" refers solely to proprietary interests the ILEC may have in an element, and does not refer to the proprietary interests of third parties, such as vendors or non-ILEC partners. The statute establishes a standard for piercing the proprietary rights of those with unbundling obligations – the ILECs. This section does not contemplate limiting an ILECs' unbundling obligation based on its use of proprietary *vendor* equipment, processes, or information. Indeed, the Commission

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37 *Local Competition First Report and Order,* ¶ 481.

38 *FNPRM,* ¶ 15. ALTS disagrees with the notion that interfaces, functions, features, or capabilities sought by a requesting carrier must be *widely* available from vendors. Unless such components are developed, used or licensed exclusively by the ILEC, it cannot be considered proprietary.

39 *Id.* ("We also seek comment on whether non-carrier specific standards can be proprietary.").

should make clear that ILECs must secure agreements with their vendors that reflect their statutory obligation to provide unbundled access to certain network elements and that such agreements cannot be used by ILECs in their efforts to stall competitive entry and end-run their unbundling obligations.

Three years of experience in implementing the 1996 Act have shown that establishing an environment conducive to efficient competitive entry requires action designed to prevent ILEC attempts at gaming the Commission's rules. In this regard, ALTS believes that it is critically important for the Commission to curb preemptively, ILEC efforts to develop proprietary interfaces, equipment and protocols solely for the purpose of avoiding an unbundling obligation. Network elements that are modified in such a way so as to prevent interconnection with or make incompatible a competing carrier's equipment should not be recognized as "proprietary."[40]

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40 For example, as ALTS discusses below, the Commission should establish that a digital subscriber line access multiplexer ("DSLAM") or other multiplexing, concentration or routing equipment should be unbundled as part of a loop or transport UNE when it is technically integrated into those UNEs. Currently, DSLAMs are "off the shelf" technology available to ILECs and all other carriers from a number of vendors and can in no way be considered "proprietary," for the purposes of Section 251(d)(2)(A). In order to evade the obligation to provide the DSLAM as part if an integrated loop or transport UNE, an ILEC may be tempted to contract with a vendor to affect some ILEC-specific changes to the standard technology in an attempt to classify the DSLAM as "proprietary." The Commission should foreclose the opportunity for such regulatory gaming by declaring that such modifications to "off the shelf" technology will not extend "proprietary" status to the equipment.

3. Unbundled Access to a Proprietary Network Element Is Necessary if No Reasonable Substitute Is Available from the ILEC, through Self-Provisioning, or from Another Non-ILEC Source

In light of the narrow definition and interpretation of the term "proprietary" proposed in the previous section, ALTS believes that the Commission likely will need to apply the necessary standard on rare occasions. In its attempt to give substance to the necessary and impair standards, ALTS submits that the Commission's focus must remain on a competitor's ability to compete in the absence of an unbundling requirement. Consistent with the Supreme Court's mandate that the Commission must give substance to the "necessary" requirement and, in so doing, cannot blind itself to the availability of elements outside the incumbents' network, ALTS proposes the following interpretation of the necessary standard:

> *Unbundled access to a network element that is "proprietary in nature" is "necessary," for the purposes of Section 251(d)(2)(B), if (i) if no non-proprietary substitute is available from the ILEC or a non-ILEC source, and (ii) if failure to provide unbundled access would materially diminish the requesting carrier's ability to offer a competing service offering comparable functionality. In determining whether unbundled access to a proprietary network element is necessary, the Commission should evaluate the availability of comparable non-proprietary ILEC substitutes and comparable non-ILEC substitutes on the basis of functionality, quality of service, cost, scope of availability, timeliness of provisioning, and other factors, consistent with the public interest.*

ALTS' proposed definition of the term "necessary" is tailored to serve the objectives of the Act by ensuring that unbundled access to proprietary network elements is required only when there are no reasonable substitutes available from the ILEC or non-ILEC sources.

Factors. In determining whether unbundling of a proprietary network element is necessary, the Commission must evaluate whether a substitute of comparable functionality can be obtained through unbundled access to non-proprietary ILEC network elements, through self-provisioning, or from another non-ILEC source.[41] The Commission cannot, however, stop its analysis there. To be an effective substitute, an alternative network element must be one that not only could but *would* be used by efficient competitors. In other words, the availability of *any* alternative does not act as a bar to meeting the statutory unbundling standard. Unless the alternative network element can be substituted in a way that results in no material decrease in quality, increase in cost, limitation in scope, or delay in bringing a competitive service offering to market, its availability is irrelevant to the statutory test, as it would not provide CLECs with a means to compete.

Thus, in applying the "necessary" standard, the Commission must consider several factors, including functionality, quality of service, cost, scope of availability, and timeliness of provisioning of proposed alternatives to the proprietary network element, in order to determine whether a network element alternative reasonably can be substituted so that unbundling of an ILEC proprietary network element is unnecessary.[42] Notably, the Commission also may consider other factors, consistent with the public interest,

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41 *FNPRM*, ¶ 21 ("[W]e must take into account the availability of substitutes for incumbent LEC network elements outside of the incumbent's network. We thus seek comment on when we should deem a substitute sufficiently available so as to render access to the incumbent's network element unnecessary.").

42 *Id.*, ¶ 20 ("[W]e seek more specific comment on what factors or criteria the Commission should adopt in determining whether access to network elements is necessary and whether failure to provide such access would impair an entrant's ability to provide service.").

which could lead to the conclusion that unbundling of a proprietary network element is "necessary."

Functionality. Most critically, unbundling of a proprietary network element should be deemed necessary in the absence of a substitute element capable of delivering comparable functionality. Comparable functionality is best measured by determining whether or not a substitute element enables the requesting carrier to offer services capable of competing with those offered or that could be offered by the ILEC using its proprietary functionality. Functionality should be assessed not only in terms of what carrier or end user product offerings use of the element makes possible, but also with respect to connectivity and compatibility with CLEC networks and UNEs obtained from the ILECs. If a substitute for a proprietary network element requires additional equipment or steps to access or implement the incorporated functionality properly, it is likely to have a material impact on CLECs' ability to compete and is not likely to be a reasonable substitute. The Commission also should assess whether use of the substitute network element has any negative impact on the ability of requesting carriers to meet their legal and regulatory obligations. Unless the substitute network element offers functionality that is comparable with that offered by the ILECs' network element, it cannot reasonably be substituted and ILEC unbundling must be required.

Quality. To be a reasonable substitute, alternatives to proprietary ILEC elements must be capable of delivering comparable functionality with no material loss in quality. Quality, as it is used in this analysis, is a measure of grade (how good the alternative is) and reliability (how often and for what period the alternative actually will be available). In large part, quality can best be measured by assessing consumer acceptance. For

example, if use of an alternative results in a competitive service offering with greater levels of signal loss, circuit outage or mean repair time compared to that of the incumbent, it cannot be found that the alternative presents the requesting carrier with an element that consumers will accept as part of a competing service offering. If an alternative element does not make possible the offering of a competing product that will win consumer acceptance, it cannot be reasonably substituted and unbundling of the proprietary ILEC network element must be deemed necessary.

Cost. In terms of cost, the Commission must determine whether the alternative to the ILEC proprietary network element requires requesting carriers to incur materially higher development and deployment costs or materially lower economies of scale.[43] In the case of non-proprietary ILEC-provisioned substitutes, the Commission must assess whether use of those substitutes will force competitors to absorb a straight material increase in cost. With regard to non-ILEC-provisioned substitutes, development costs and the costs of assuring connectivity with other ILEC-provisioned UNEs also must be considered. If an alternative element imposes increases in development and deployment costs and decreases in economies of scale that are material, the alternative cannot be considered a reasonable substitute and unbundling of the proprietary ILEC network element must be required.

Scope and Timeliness. In terms of scope of availability and timeliness of provisioning, the Commission must determine that the proposed substitute element is

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43 In its *Local Competition First Report and Order,* the Commission concluded that ILECs "have economies of density, connectivity, and scale . . . [that must] be shared with entrants." *Local Competition First Report and Order,* ¶ 11; *FNPRM,* ¶ 26. This conclusion is consistent with the language and objectives of the 1996 Act and remains good law.

practically available throughout the geographic area and in the timeframe and quantities sought by requesting carriers, and that otherwise would be available if the Commission required unbundling of the proprietary ILEC network. Additional time and delay in obtaining access to a network element component of a CLEC service offering can render that offering uneconomic or unacceptable to an end user. Order of market entry and service fulfillment ability have a significant impact on carriers' ability to bring competitive service offerings to the market. If an alternative element is not available in sufficient quantities that can be obtained in a timely manner, it cannot be a reasonable substitute and unbundling must be deemed necessary.

Sources. The Supreme Court's opinion requires that the Commission, in applying the necessary standard, look to sources beyond the ILECs' networks.[44] Thus, in determining whether the necessary standard is met, the Commission should evaluate whether a reasonably substitutable non-proprietary network element is available from the ILEC, *and* whether substitute functionality can be obtained through non-ILEC sources, including self-provisioning and competitive vendors.

ILEC Alternatives. In examining potential substitutes that may be available from the incumbent, the Commission should limit its inquiry to network elements that are offered on an unbundled basis. The Commission should not consider resale of a service based on the same element to be a reasonable substitute. Such a standard would eviscerate the 1996 Act's "bright line" distinction between the resale and UNE methods of entry. Moreover, the cost differential between resale and UNE access materially

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44 *FNPRM,* ¶ 24 ("We seek comment on how the Commission should consider the availability of network elements outside of the incumbent's network.").

would diminish a competitor's ability to compete and, thus, resale could not be deemed a reasonable substitute that makes unbundling of a corresponding proprietary ILEC network element unnecessary.

Self-Provisioning. The Commission's review of potential substitutes also should explore the possibility of requesting carriers self-provisioning a reasonable substitute for the proprietary ILEC network element. However, in this analysis, the Commission should be mindful of its rule omitting a facilities ownership requirement.[45] That rule was upheld by both the Eighth Circuit and the Supreme Court.[46] Mindful of this guidance, the Commission's self-provisioning inquiry can explore the degree to which requesting carriers already self-provision a reasonable substitute and their ability to expand self-provisioning to meet anticipated needs. Importantly, self-provisioning only can be considered a reasonable substitute if the equipment deployed is fully compatible with other network elements obtained from the ILECs on an unbundled basis.

Other Non-ILEC Sources. As required by the Supreme Court, ALTS' reasonable substitute analysis contemplates, and in fact, rests largely on exploring the availability of alternatives from non-ILEC sources other than the requesting carrier. Such sources may include other carriers and service providers. Substitute elements available from these non-ILEC sources must be evaluated on each of the factors listed above. Unless the alternative offers comparable functionality, with no material decrease in quality, increase in cost, limitation in scope of availability or delay in provisioning, unbundling of the proprietary ILEC network element will be necessary.

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45 *See Local Competition First Report and Order,* ¶¶ 328-40.

46 *Iowa Utils. Bd.,* 120 F.3d at 816-17; *AT&T,* 119 S.Ct. at 736.